

Is it rational and consistent? the WTO's surprising role in shaping domestic public policy

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Is it rational and consistent?
The WTO's surprising role in shaping domestic public policy

Abstract

What makes regulation rational? And why is rationality important to an international tribunal? In the WTO context, these questions have had significant implications for the public policy of its Member countries. The WTO Appellate Body's emerging emphasis on means-ends rationality testing is based on the questionable premise that consistent regulation is non-discriminatory. It has led regulators, such as the EU, to defend – and probably even construct – complex regulation in a way that emphasizes conformity to one overarching policy objective. More surprisingly, the Appellate Body has re-cast itself as public policy watchdog, pointing out when governments do not appear to be committed to their cause. In response, governments have strengthened disputed regulation, rather than making it less trade-restrictive. This retreat to rationality can be seen as a result of a difficult challenge facing the Appellate Body: how to review national regulation without passing judgment on it. More specifically, the rationality test pays the price of the Appellate Body's retreat from proportionality.

1. Introduction

Recent WTO disputes reveal an emerging emphasis on regulatory consistency and rationality. The Appellate Body assumes that a *consistent* approach to achieving a regulatory objective reveals its *rationality*. This contributes to a conclusion that the regulation is *not discriminatory*. This approach was first applied as part of the discrimination analysis under the GATT Article XX chapeau, and has since been incorporated under TBT Article 2.1. To date, three dispute rulings have been based primarily upon perceived failures of rationality: *Brazil – Tyres* (2007)¹, *US – Tuna II*² (2012) and *EC – Seal Products* (2014).³ This test is being applied in cases where the trade-restrictive regulation has a strong public policy basis; the disputes in question focus on regulations to support public health, animal welfare and public morals, respectively.

This rationality test raises questions about how WTO dispute settlement influences national public policy. Clearly the dispute settlement bodies critically review Member States' regulation. This is to achieve a delimited goal: determining whether a domestic regulation disputed by another WTO Member State (or States) violates WTO law. In the context of the provisions cited above, the goal more specifically is to establish that the regulation in dispute does not discriminate against products from one Member State as compared to another's (eg imported vs domestic products).

¹ WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, WT/DS332/AB/R, adopted 3 December 2007.

² WTO Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US – Tuna II)*, WT/DS381/AB/R, circulated 16 May 2012

³ WTO Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC – Seal Products)*, WT/DS400/AB/R; WT/DS401/AB/R, adopted 18 June 2014.

Yet a review of disputes in which this test has been applied reveals that the goal of regulatory review can become blurred due to spurious correlation between consistency, rationality and non-discrimination. Establishing rationality as a goal suggests that regulation needs to be perfect and leads to the Panel and the Appellate Body imposing unrealistic standards. The rationality test rests in the gray area between the narrower objective of identifying the existence of discrimination and the broader aim of judging whether regulation is ‘good’; eg clear and effective. Although the WTO dispute settlement process may well result in ‘better’ regulation, this should be limited to a side-effect of eliminating discrimination (rather than the primary objective).

As a component of the non-discrimination analysis, this rationality test takes on varying degrees of prominence. Past disputes reveal that is most likely to be applied when there is variability in standards, eg, a regulation with exceptions, or calibration of standards to respond to varying degrees of regulatory risk. More specifically, disputes have focused on regulation that contravenes WTO obligations in order to comply with a Regional Trade Agreement, environmental regulation and regulation with multiple objectives. These categories of regulation attracted scrutiny precisely because of their complex approach to managing the regulatory risk, which called into question their consistency. However, this also means that the Appellate Body is foregrounding a requirement for consistency when it is least likely to be met.

Also, the implementation of dispute outcomes has a curious under-recognized feature: countries are responding to WTO losses with stricter regulation. They could achieve the consistency the ruling required by removing trade restrictions. However in all three cases they instead introduced a higher standard of protection. In *Brazil-Tyres*, Brazil extended its public-health driven import ban on re-treaded tyres so that it also covered MERCOSUR countries who were previously exempted.⁴ In *US – Tuna II*, in which dolphin-protection regulation was in dispute, the US introduced further dolphin-safety monitoring requirements impacting its domestic fleet.⁵ In *EC – Seal Products*, in which seal welfare regulation was in dispute, the EU eliminated one exception to its ban on seal product imports and made another depend on seal welfare outcomes.⁶

This is because the approach focuses on whether disputed regulation exhibits lower standards of protection for domestic products, or for some countries’ products versus others. A simple fix is thus to make regulation uniformly stricter. Of course, there is nothing deterministic about this response; it depends on domestic factors. In Brazil’s case, the Executive Branch was initially divided about whether to achieve consistency by banning all re-treaded tyres, including from MERCOSUR countries, or allowing in all re-treaded tyres, including from the EU. A combination of domestic environmental lobbies and companies’ lack of interest in importing re-treaded tyres from Uruguay resulted in the final decision to ban MERCOSUR imports.⁷ As documented below, strong and engaged animal welfare lobbies in both the US and the EU also influenced their decision to strengthen the disputed regulation.

⁴ M Dias Varela, ‘Implementing DSB Reports: An Analysis Based on Brazil’s Retreaded Tires Case’ (2014) 32 Wisconsin International Law Journal, pp. 719-720.

⁵ Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40997 (July 9, 2013) (to be codified at 50 C.F.R. pt. 216).

⁶ ‘Regulation (EU) 2015/1775 amending Regulation (EC) No 1007/2009 on trade in seal products and repealing Commission Regulation (EU) No 737/2010’, OJ L 262/1, 6 October 2015.

⁷ Varela, above n. 4, at pp. 719, 722.

These decisions did likely make market access conditions more difficult for the parties whose interests were ostensibly being favoured. Yet countries who win WTO disputes hope for more market access for their products; that is the motive for complaining after all. Disappointment leads complainants to push the dispute settlement system to correct this perceived failure; the ongoing *US – Tuna II* compliance controversy is illustrative. In principle such responses are entirely compliant with the non-discrimination principle, which passes no judgment on the trade-restrictiveness of a regulation; it only concerns itself with symmetry in treatment between products from all countries. Ensuring non-discrimination, rather than securing market access, is the goal of the relevant provisions.

Putting these observations together reveals contradictory conclusions. On the one hand, the approach intrudes excessively into the domestic policy-making process. Activists have critiqued the Appellate Body rulings in all of the disputes analysed herein on the basis that they undermined governments' ability to regulate in the public interest. Yet the end result of each dispute has been to amplify the protection of these same public policy goals, even beyond the intent of regulating governments. Thus there are unexpected, even accidental, beneficiaries, in this case seals and dolphins.

In this article, I first situate the rationality test in the context of WTO non-discrimination provisions, then introduce three disputes in which a failure of regulatory rationality formed the basis for WTO non-compliance. Finally, I identify cross-cutting themes: confused identity between discrimination and 'bad' regulation, implementation resulting in stricter regulation and a retreat from proportionality-style reasoning.

2. The elusive search for rational regulation and regulatory rationale: the legal context

The regulatory rationality test occupies an important niche in WTO non-discrimination provisions, as it aims to establish whether a regulation in dispute has a legitimate, that is to say non-discriminatory purpose. Some brief context is useful to reveal the controversial history of this particular element of the non-discrimination analysis, and to illuminate why the interpretation of some seemingly parallel provisions has evolved in a disparate manner.⁸

The test forms a component of GATT Article XX, as well as the non-discrimination provision under the Technical Agreement on Barriers to Trade, Article 2.1, which utilizes different language but incorporates similar reasoning.

The Appellate Body in *EC – Seal Products* has defined it as follows:

*One of the most important factors in the assessment of arbitrary or unjustifiable discrimination [under the Article XX chapeau] is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under...Article XX.*⁹

Article XX identifies public policy goals agreed by WTO Member States, including protecting public morals and human animal and plant health, preventing deceptive practices and conserving

⁸ For a more comprehensive analysis, please refer to: J Flett, 'WTO Space for National Regulation: Requiem for a Diagonal Vector Test' (2013) 16(1) *Journal of International Economic Law*, pp. 37-90; W Zhou, 'US – Clove Cigarettes and US – Tuna II (Mexico): Implications for the role of regulatory purpose under Article III:4 of the GATT' (2012) 15(4) *Journal of International Economic Law*, pp. 1075-1122; Lydgate, Emily, 'Sorting out mixed messages under the WTO national treatment principle: a proposed approach', (2016) 15(3) *World Trade Review*, pp. 423-450.

⁹ *EC – Seal Products*, above n. 3, at para. 5.306.

exhaustible natural resources. If regulation qualifies for coverage under these listed exceptions it will conform with the GATT Agreement, even if it violates another GATT provision. The regulation must also comply with the Article XX chapeau. The chapeau reads in part: ‘Subject to the requirement that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination*. . . nothing in this Agreement [the GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures...’¹⁰ specified in the listed exceptions. [emphasis added]

This gives rise to complexity, as regulations that fall under GATT Article XX subparagraphs are subject to a distinct non-discrimination analysis, whose intent is to prevent countries from abusing the subparagraphs. Thus the Appellate Body has had to distinguish the chapeau non-discrimination analysis from its counterpart under substantive GATT provisions such as Article I(1), the Most Favoured Nation Principle, and Article III, the National Treatment Principle. The chapeau’s non-discrimination test has been elaborated extensively throughout the disputes, but has led to a somewhat incoherent body of case law which identifies several elements of ‘arbitrary and unjustifiable discrimination’ under the chapeau, including not only regulatory rationality but also flexibility and willingness to negotiate, and focusing on a measure’s ‘application’, and applies them on a dispute- by dispute- basis.¹¹

The non-discrimination analysis under the Agreement on Technical Barriers to Trade creates a third point in this legislative triangle. The TBT differs from the GATT in that it applies only to technical regulations, as defined within the Agreement, but there is some overlap with GATT Articles I and III. Its non-discrimination provision, Article 2.1 reads:

*Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.*¹²

The language and function of this provision most closely resemble GATT Article III(4), the National Treatment Principle paragraph dealing with regulation.¹³ Yet in practice it straddles Article III(4) and the chapeau, incorporating elements of both.

A full exploration of these differences is beyond the remit of this particular article. Nonetheless for our purposes the divergence can basically be understood as the degree to which these provisions take account of the non-discriminatory policy objectives at stake. Article III(4) is a market-based test, in that the Appellate Body has emphasized negative impacts on conditions of competition to the detriment of imported products as the decisive criterion of a violation.¹⁴ There is no consideration of whether a legitimate policy objective can explain this negative impact.

To justify this interpretation, the Appellate Body stated:

¹⁰ Article XX of the GATT 1994.

¹¹ The chapeau is traditionally interpreted as referring to the ‘application’ rather than the substance of a measure; however Bartels argues persuasively that this is a false dichotomy, which in any case the Appellate Body has seemingly dismissed in *EC – Seal Products*. L Bartels, ‘The Chapeau of Article XX GATT: a New Interpretation’, University of Cambridge Faculty of Law Working Paper 20/2014, 9, 22 July 2014. In *EC – Seal Products* the Appellate Body provided a useful overview of a number of factors that had been considered in past disputes to determine the presence of discrimination under the chapeau. Above n. 3, at para. 5.305.

¹² Agreement on Technical Barriers to Trade (‘TBT Agreement’) 1994, Article 2.1.

¹³ Specifically GATT Article III(4), which deals with trade-restrictive regulation.

¹⁴ This was affirmed in *EC – Seal Products*, above n. 3, at paras. 5.310-5.314.

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*In our view, the fact that, under the GATT 1994, a Member's right to regulate is accommodated under Article XX, weighs heavily against an interpretation of Articles I:1 and III:4 that requires an examination of whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction. In the light of the immediate contextual differences between the TBT Agreement and the GATT 1994, we do not consider that the legal standard for the non-discrimination obligation under Article 2.1 of the TBT Agreement applies equally to claims under Articles I:1 and III:4 of the GATT 1994.*¹⁵

Thus, according to the Appellate Body, the differing interpretation was justified by the availability of the Article XX General Exception under the GATT Agreement but not the TBT Agreement.

Under TBT Article 2.1, on the other hand, the Appellate Body has introduced an additional step of considering whether a negative competitive impact can be explained by an underlying 'legitimate regulatory distinction'. Again, this divergence can be explained by the desire to accommodate various elements of the non-discrimination analysis without replication. TBT Article 2.1 and TBT Article 2.2 parallel GATT Article III and GATT Article XX in the balance they strike between recognizing a Member State's right to regulate and preventing unnecessary obstacles to trade.¹⁶ However TBT Article 2.2 is not an exception and does not contain equivalent language to the chapeau, so the Appellate Body has simply integrated some elements of this analysis into TBT Article 2.1.¹⁷

These interpretational differences are not solely technical in nature. A discrimination analysis that includes the possibility that regulation with a negative impact upon imported products is 'innocent' will be an easier test for regulating countries to pass. Thus it gives larger scope to domestic regulatory goals. Discerning the regulatory objective is arguably the defining challenge in establishing the existence of *de facto* discrimination.¹⁸ This is because the 'real' regulatory objective may differ from the stated one; eg a country might claim that its regulation upholds animal welfare goals when its primary motive is to protect domestic products from foreign competition.¹⁹ An early WTO dispute the Appellate Body dismissed regulatory intent as

¹⁵ *EC – Seal Products*, above n. 3, para. 5.125.

¹⁶ See *ibid*, at paras. 93-96.

¹⁷ See discussion below.

¹⁸ WTO law covers both *de jure* and *de facto* discrimination; in the former the measure formally discriminates between products whereas the latter covers discrimination 'in fact' that is not apparent from reading the measure itself.

¹⁹ There is a vast body of scholarship on how to determine whether regulation is discriminatory; see eg See, eg, R Hudec, 'GATT/WTO Constraints and National Regulation: Requiem for an "Aim and Effect" Test', 32 *International Lawyer* 619 (1998); DH Regan, 'Further Thoughts on the Role of Regulatory Purpose Under Article III of the General Agreement on Tariffs and Trade: A tribute to Bob Hudec', 37(4) *Journal of World Trade*, 734-760 (2004); DH Regan, 'Regulatory Purpose and 'Like' Products in Article III(4) of the General Agreement on Tariffs and Trade (With Additional Remarks on Article III:2) ', 36(3) *Journal of World Trade*, 443-478 (2004); E Reid, 'Regulatory Autonomy in the EU and the WTO: Defining and Defending Its Limits' (2010) 44(4) *Journal of World Trade* 877, 891.

‘subjective’²⁰ and since has attempted to identify more objective measures. For example under TBT Article 2.1, in examining whether a negative competitive impact stems exclusively from a legitimate regulatory distinction, “a panel must carefully scrutinize the particular circumstances of the case, that is, the *design, architecture, revealing structure, operation, and application* of the technical regulation at issue, and, *in particular, whether that technical regulation is even-handed*, in order to determine whether it discriminates against the group of imported products.”²¹ [Emphasis added]

Herein enters the rationality test. This examination of the rationality of the regulation forms part of the evaluation of ‘even-handedness’ under TBT Article 2.1 and the imperative to avoid ‘arbitrary or unjustifiable’ discrimination under the Article XX chapeau. While the Appellate Body has not spelled out the intent of the test, the underlying hypothesis seems clear: lack of arbitrariness, or even-handedness, can be demonstrated through the application of a consistent regulatory standard of protection. If a standard is not upheld uniformly to all the products being regulated, this throws into question the regulatory objective itself. If the products receiving laxer regulatory standards are domestic, or come from one particular country at the expense of another, this suggests that discrimination is the underlying causal factor.

The Appellate Body has stated that the Article XX chapeau is not functionally equivalent to the TBT Agreement’s ‘legitimate regulatory distinction’ test.²² However, the rationality test comprises a parallel element. The parallelism is underpinned by the conceptual similarities between avoiding *arbitrariness* (under the chapeau) and achieving *even-handedness* (under TBT Article 2.1) with respect to the specific regulatory objective at stake.

3. Achieving regulatory rationality: the disputes

A failure of regulatory rationality formed the basis for WTO non-compliance under the Article XX chapeau and TBT Article 2.1: *Brazil – Tyres* (2007), *US – Tuna II* (2012) and *EC – Seal Products* (2014). These disputes are topical; they demonstrate the impact of consistency reasoning on Regional Trade Agreements, calibrated risk assessment and regulation with exceptions. They are also iterative; the regulations became increasingly complex in each dispute and the Appellate Body further refined the approach.

A. No exceptions to the General Exception: *Brazil – Tyres* (2007)

i. The dispute

Brazil banned the import of used and re-treaded tyres on the basis that they have a shorter lifespan than new tyres; discarded tyres are breeding grounds for disease-carrying mosquitos. Disposing of them is difficult, and burning them releases toxic fumes. Brazil argued that it was

²⁰ Panel Report, *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)*, WT/DS8/R; WT/DS10/R; WT/DS11/R, circulated 11 July 1996; and Appellate Body Report, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R, adopted 4 October 1996.

²¹ In the first of a spate of recent TBT disputes, WTO Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes (US – Clove Cigarettes)*, WT/DS406/R, adopted 4 April 2012, paras. 181-182.

²² *EC – Seal Products*, above n. 3, at paras. 5.310-5.314.

restricting trade because of public health, defended under Article XX(b), the General Exception to the GATT, which covers measures ‘necessary to protect human, animal or plant life or health’.²³

But this ban had exceptions. Brazil is a member of the South American trade bloc, MERCOSUR. Through a MERCOSUR tribunal, Uruguay successfully challenged Brazil’s ban, and it began admitting some retreaded tyres from MERCOSUR countries. Also, used tyres entered the country following domestic court injunctions that overruled the ban in certain cases.

In considering whether the ban qualified for coverage under Article XX(b) as being ‘necessary’ for health, the Appellate Body deferred to Brazil with little scrutiny.²⁴ However, it was very strict in its interpretation of the chapeau.

On appeal from the WTO Panel Report, the Appellate Body concluded :

*... there is arbitrary or unjustifiable discrimination, within the meaning of the chapeau of Article XX, when a Member seeks to justify the discrimination resulting from the application of its measure by a rationale that bears no relationship to the accomplishment of the objective that falls within the purview of one of the paragraphs of Article XX, or goes against this objective.*²⁵

The fact that Brazil admitted some used tyres, on some grounds, undermined its commitment to public health.²⁶ Brazil would have needed a convincing explanation based in a public health rationale:

*In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it **bears no relationship to the legitimate objective pursued by the Import Ban** that falls within the purview of Article XX(b), **and even goes against this objective**, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.*²⁷ [Emphasis added]

To support its conclusion, the Appellate Body noted that Brazil had not cited public health reasons for the ban in the context of the MERCOSUR tribunal, and that GATT Article XXIV exempts measures permitted under Article XX from obligations under a customs union such as MERCOSUR.²⁸ The Appellate Body’s conclusion affirms that the GATT General Exception operates on a Most Favoured Nation basis: it must apply evenly to all trade partners.

The Appellate Body has a limited ability to enforce rulings from the MERCOSUR tribunal.²⁹ But the Appellate Body could have adopted the Panel’s standard of rationality: Brazil did not act for ‘capricious or unpredictable’³⁰ reasons. The Panel also suggested that having a rational relationship with one’s own policy objective is important but not decisive; trade flows have some bearing on the decision. In this case, there were few tyres actually entering Brazil from

²³ *Brazil – Retreaded Tyres*, above n. 1, at para. 119.

²⁴ See, eg, the analysis of CP Bown and JP Trachtman, ‘Brazil – Measures Affecting Imports of Retreaded Tyres: A Balancing Act’ (2009) 8(1) *World Trade Review*, pp 85-135.

²⁵ Appellate Body Report, above n. 1, at para. 246.

²⁶ *Ibid.* at para. 246.

²⁷ *Ibid.* at para. 228.

²⁸ *Ibid.* at footnote 445.

²⁹ Dispute Settlement Understanding Article 3(2) commits the Appellate Body to ensuring that its rulings do not ‘add to or diminish the rights and obligations’ of Members under the WTO Agreements.

³⁰ WTO Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil – Retreaded Tyres)*, WT/DS332/AB/R, circulated 12 June 2007, para. 7.273.

MERCOSUR.³¹ The Appellate Body could also have justified Brazil's exception to the General Exception without deferring to an external treaty by referring to GATT Article XXIV:4, which states that:

the contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements.

This gives some authority to enable RTAs to pursue their integration objectives. Also, the Appellate Body has stated that the WTO Agreements are 'not to be read in clinical isolation from public international law'; on this basis the MERCOSUR ruling has some influence.³² However the Appellate Body upheld a very high standard for consistency, and privileged this above the concept of tiered liberalization through an RTA.

ii. Implementation: Strengthening the ban on re-treaded tyres

To comply with the WTO ruling, Brazil strengthened its ban. It sought a ruling from the Brazilian Federal Supreme Court suspending lower courts' injunctions permitting import of used tyres. It also proposed negotiations with MERCOSUR on a new regime for the importation of retreaded tyres, whose details it did not specify, but which the EU alleged would likely involve tightening the ban on a systemic level.³³

The dispute went to arbitration under Article 21.3(c) to determine a reasonable period of time for implementation. The EU argued that the only possible option for Brazil to respond to the ruling within a reasonable period of time was to repeal the ban. The Arbitration Report makes clear that what was at issue was not only how long it took Brazil to implement the ruling, but how it chose to do so. While the EU demonstrated its dissatisfaction using the means it had available, this was not a very persuasive approach. As the arbitrator noted, Brazil was free to respond to the ruling as it saw fit, and 'modifying the existing import ban in a way that would rectify the inconsistencies with the chapeau of Article XX' was within the range of permissible actions.³⁴

In other words, Brazil was entirely within its rights in creating a more trade-restrictive ban in response to the ruling. 'Rectifying the inconsistencies', essentially by removing the selective liberalization exceptions, was a means for complying because it created a rational relationship between the measure and its public health objective. However it is easy to understand the EU's frustration that a favourable WTO ruling did not result in the removal of the ban about which it had complained.

B. Obsessive consistency: *US – Tuna II (2012)*

i. The dispute

³¹ Indeed the Appellate Body acknowledged that 'effects' could be a factor in the relevant as the chapeau considers the 'manner of application' of the measure at issue, but chastised the Panel for relying 'exclusively' on them. Appellate Body Report, above n. 1, at para. 230.

³² *US – Gasoline*, WTO Appellate Body Report on United States – Standards for Reformulated and Conventional Gasoline (*US – Gasoline*), WT/DS2/AB/R, adopted 29 April 1996, at para. 16.

³³ *Brazil – Measures Affecting Imports of Retreaded Tyres*, Arbitration under Article 21.3(c) on the Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO/DS332/16, 29 August 2008, paras. 35-36.

³⁴ *Ibid.* at para. 58.

Under US law, tuna could only be labeled ‘dolphin safe’ if it was not fished by encircling the dolphins congregating underneath. But this requirement only applied in the Eastern Tropical Pacific (‘ETP’).³⁵ Tuna caught outside the ETP using other methods automatically qualified for the label. Most Mexican fisherman caught tuna inside the ETP by setting nets on dolphins. Most US fisherman caught tuna outside the ETP by other means.

The US argued that encircling dolphins was more harmful than other fishing techniques, and that tuna and dolphin congregations occurred more in the ETP. In the context of TBT Agreement Article 2.1, the Appellate Body was ‘not persuaded that the United States has demonstrated that the measure is evenhanded, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins.’³⁶ This was because dolphins were being harmed through fishing techniques that the US allowed to take place, undermining the regulatory objective, coupled with the fact that this was happening in the region where most US fishing vessels caught tuna, suggesting that the US’s intent was discriminatory.

The Panel, responsible for findings of fact, examined the veracity of the US and Mexico’s contesting accounts of the impact on dolphins of various fishing techniques. To come to its conclusion, the Appellate Body evaluated the Panel’s factual assessment and concluded that the labeling requirements were not appropriately calibrated to the threat levels to dolphins from various fishing techniques. The justification for the regulation, and its emphasis on preventing the encircling of dolphins, was founded in US regulators’ scientific risk assessment of impacts on dolphins from various fishing techniques. The dispute settlement bodies did not have a particular specialism in this area. Thus they were faced with the problem of how to adjudicate the appropriateness of a regulation based upon technical and scientific knowledge.

The Panel reconstrued the US’s regulatory objective in a way that made a finding of rational inconsistency more likely. Despite the fact that the Marine Mammal Protection Act which underpinned the US’s regulatory standard also focused on harm or trauma to dolphins, it focused solely on dolphin mortality. Then, when assessing the problem of dolphin injury and mortality outside of the ETP the Panel acknowledged that it relied upon ‘on a limited amount of ad hoc studies’ to draw conclusions.³⁷ It concluded that “...it appears that a number of aspects of this issue [effects of tuna fishing on dolphins] are not fully documented and that further research may be necessary in order to ascertain the exact situation in various areas.”³⁸

Thus the Panel was aware of the limits of the evidence and gaps in understanding of the issue. The Panel, backed by the Appellate Body, upheld a standard for consistency and rationality that seemed unrealistically rigorous considering the quality of information available. Furthermore, the Panel eliminated some of the evidence that its decision was based upon, treating it as confidential, despite the fact that it presumably dealt with relevant information such as fishing patterns and dolphin mortality rates. This makes it difficult to assess the robustness of arguments regarding risk to dolphins that the Parties submitted, as well as the Panel’s assessment of these risks.

³⁵ WTO Panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (*US – Tuna II*), WT/DS381/R, circulated 15 September 2011, at para 2.15.

³⁶ *US – Tuna II*, WTO Appellate Body Report, above n. 2, at para. 297.

³⁷ Panel report 7.519-7.523

³⁸ *Ibid* at para. 7.623.

The treatment of evidence in this dispute has wider implications for environmental regulations based on complex ecosystems. Despite the ‘wide space’³⁹ that WTO Agreements such as TBT Article 2.1 provide to justify public policy regulation, the Panel demanded a greater degree of certainty than scientists were able to establish. In a critique of the Panel Report, Acuri argues that ‘if any evidence of the imperfection of a measure can be used against it, environmental measures would clearly have short lives under WTO law.’⁴⁰ In sum, a domestic risk assessment is being second-guessed by international law tribunal without specific expertise in these areas, with particularly concerning implications for environmental regulation.⁴¹

ii. Implementation: Strengthening protections for dolphins

The US responded to the Appellate Body’s ruling by making its regulatory requirements for preventing harm to dolphins stricter. The US left unchanged the regulation that formed the focus of Mexico’s complaint: tuna-fishing vessels operating within the ETP, by setting nets on dolphins, still cannot receive the label. However, the US made it harder for vessels operating outside the ETP utilizing alternative methods to qualify. Rather than receiving the label automatically, vessel captains had to certify that no dolphins were harmed. The US also introduced a mechanism to determine if an ETP fishery has a regular tuna dolphin association through including an observer on the boat.⁴²

The US’s response to the ruling reveals the perceived importance of safeguarding the Marine Mammal Protection Act. It seems reasonable to assume that Mexico hoped that a favourable ruling would result in the US relaxing its dolphin-safe standards, for example by relying upon the international certification scheme which Mexico advocated, which did not prohibit setting on dolphins. On the grounds that the US had not adequately implemented the ruling, Mexico initiated compliance proceedings under Article 21.5 of the Dispute Settlement Understanding.

The Appellate Body identified remaining areas of inconsistency of treatment between domestic and imported products, focusing on areas in which US regulatory tightening did not go far enough, such as the fact that it required observers only on boats within the ETP.⁴³ The Appellate Body also took the Panel to task for not providing a ‘proper assessment’ of the risk from different fishing techniques for it to complete the analysis on the even-handedness of the US’s other regulatory reforms.⁴⁴ As stated above, there was not enough understanding of the relationship between fishing methods and risk to dolphins to meet the Appellate Body’s impossible standard, but it blamed the Panel for making it impossible to ‘complete the analysis’.

³⁹ H Andersen, ‘Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions’ (2015) 18(2) *Journal of International Economic Law*, p. 383.

⁴⁰ A Arcuri, ‘Back to the Future: US – Tuna II and the new Environment-Trade Debate’, (2012) 2(3) *European Journal of Risk Regulation* 187.

⁴¹ I further develop the argument that this approach to risk assessment has the potential to undermine environmental regulation in E Lydgate, ‘The EU, the WTO and Indirect Land Use Change’ (2013) 47(1) *Journal of World Trade*, pp. 159-186.

⁴² Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, above n. 5.

⁴³ ‘In particular, we considered that the determination provisions do not provide for the substantive conditions of access to the dolphin-safe label to be reinforced by observer certification in all circumstances of comparably high risks, and that this may also entail different tracking and verification requirements than those that apply inside the ETP large purse-seine fishery.’ Appellate Body Report, *US – Tuna II* (21.5 – Mexico) circulated 20 November 2015 (WT/DS381/AB/RW), para. 7.266.

⁴⁴ *Ibid.*

Mexico is still unsatisfied with the Appellate Body decision and has requested a second Compliance Panel, whose report is due in July 2017.⁴⁵ The Appellate Body Report on Article 21.5 noted that ‘Mexico’s core argument...is that key elements of the original measure...remain unchanged, such that Mexican products are still being excluded from access to the dolphin-safe label....’⁴⁶ The United States explicitly acknowledged that the trade restrictions remained unchanged, but is implementing the ruling by tightening restrictions on domestic producers.⁴⁷ The central issue of WTO-compliance has become whether the US has strengthened its domestic requirements enough to be even-handed. The outcomes of such a race for compliance are unlikely ever to satisfy Mexico.⁴⁸

C. Unifying all objectives: *EC – Seal Products* (2014)

i. The EC banned the import of seal products, on the basis that marketing seal products was cruel and violated the ‘public morals’ of EU citizens, falling under Article XX(a) of the General Exceptions. Yet, as in *Brazil – Tyres*, this ban had some exceptions. The most significant of these was the subject of the appeal before the Appellate Body. It applied to seal products from hunts traditionally conducted by Inuit and other indigenous communities. This so-called IC exception was found not to be compliant with the Article XX chapeau, primarily because the Appellate Body found there was not a rational relationship with the EU’s objective of protecting public morals regarding seal welfare.⁴⁹ In other words, if the EU wanted to prevent seals from being killed in an inhumane manner, why would it enable Inuits to do so? The Appellate Body also noted that IC sealing in Greenland resembled banned commercial hunts, rather than traditional subsistence hunts.⁵⁰

Defining the EU’s policy objective was arguably the most contentious and complex aspect of the dispute. The IC exception did not support the EU’s overarching goal of protecting ‘seal welfare’; it went against it. To complicate matters further, the EU argued that the exceptions were part and parcel of its so-called ‘Seal Regime’, based on the fact that the unified ‘purpose’ of the regulation was non-commercial.⁵¹

⁴⁵ See WTO dispute summary, DS381: United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products Dispute Summary: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm (accessed 19 December 2016)

⁴⁶ Above n. 42 at para. 7.235.

⁴⁷ Ibid.

⁴⁸ U.S. Implementation of Adverse WTO Rulings: A Closer Look at the Tuna-Dolphin, COOL, and Clove Cigarettes Cases, American Society of International Law, 17(23), October 30, 2013, available at: http://www.asil.org/insights/volume/17/issue/23/us-implementation-adverse-wto-rulings-closer-look-tuna-dolphin-cool-and#_edn10 (accessed 5 June 2014).

⁴⁹ “IC hunts can cause the very pain and suffering for seals that the EU public is concerned about.” Ibid, quoting the Panel.

⁵⁰ ‘Seal products derived from what should in fact be characterized as “commercial” hunts could potentially enter the EU market under the IC exception.’ Ibid. at para. 5.328.

⁵¹ Ibid, at paras. 5.223, 5.225. More specifically, the EU argued that its objectives were twofold: first, addressing public moral concerns about the EU public’s participation as consumers of inhumanely killed seals; second, addressing public moral concerns about the number of inhumanely killed seals. Addressing the ‘public morals’ concerns of EU citizens (its first objective) had two aspects: first, the incidence of inhumane killing of seals, and second, their ‘individual and collective participation as consumers in, and exposure to, the economic activity which sustains the market for commercially-hunted seal products.’ The EU also argued that the second objective was an instrument to achieve the first.

The EU acknowledged that the IC exception was not related to the welfare of seals *per se*, but instead fulfilled another objective. The moral concern in the IC exception was the risk of endangering the subsistence of Inuit and other indigenous communities protected by International Law. It exempted these products ‘...in order to mitigate the adverse effects on those communities resulting from the EU Seal Regime to the extent compatible with the main objective of addressing the public moral concerns with regard to the welfare of seals.’⁵²

In its strained attempts to unify its regulatory objectives, a repeated theme of the dispute settlement reports, the EU seems to be dancing to the WTO drumbeat from *Brazil – Tyres*. It failed its attempt. The Appellate Body concluded that that the IC exception should achieve the same goals as the ban: seal welfare. It stated:

*... the European Union has failed to demonstrate...how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to ‘commercial’ hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare.*⁵³

This precedent is problematic. Imagine that the exception covered seal products that had important human health uses; for example, seal organs that were necessary to save human lives. If considered in its own right, such a policy goal would be justifiable. It is simply because it is an exception to the main regulatory objective that it poses problems. As argued by Durán, the Appellate Body should distinguish between ‘domestic regulations serving multiple *legitimate* purposes and those adopted for a mixture of *proper* and *improper* purposes’.⁵⁴ Similarly, the EU should be within its rights to set regulation to protect the rights of Indigenous people, even if this goes against its seal welfare goal. There should not be a requirement that the exceptions work in concert with the measure as a whole.

The Appellate Body’s reasoning erroneously suggests a causal relationship between measures pursuing conflicting objectives and measures being discriminatory. This shaped the way that the EU defended, and even formulated, its regulatory objectives, in a way that does not contribute to its goals regarding seal welfare or Inuits. In fact, as documented below, the drive to create clear and consistent regulatory objectives in order to conform with WTO law may have been harmful to these goals.

ii. Implementation: strengthening protection for seals

The EU responded to the WTO ruling by making its protections for seal welfare stricter. First, it eliminated the so-called MRM exception to the ban, that allowed seal products for marine resource management purposes to be sold in the EU, on the basis that such hunts could not be distinguished from commercial hunts (a lack of consistency in the regulatory objective).⁵⁵

Second, it introduced consideration of seal welfare as a criterion of the IC exception.⁵⁶ The implementation of the ruling was hailed as a victory by animal rights groups such as the Humane

⁵² *EC – Seal Products*, Appellate Body Report, above n. 3, para. 5.319.

⁵³ *Ibid.* at para. 5.320.

⁵⁴ GM Durán, ‘Measures with Multiple Competing Purposes and WTO Law’ (2016) 19(2) *Journal of International Economic Law*, p. 473.

⁵⁵ ‘Regulation (EU) 2015/1775, above note 6. .

⁵⁶ ‘The hunt is conducted in a manner which has due regard to animal welfare, taking into consideration the way of life of the community and the subsistence purpose of the hunt’, *Ibid.*

Society International⁵⁷ and the International Fund for Animal Welfare.⁵⁸ But the EU was in a difficult position with respect to implementation. The EU had argued that the monitoring and enforcement of humane killing methods in IC hunts is impossible because of the environment in which sealing takes place.¹ The European Commission originally proposed the approach of monitoring seal welfare outcomes, but it was rejected by the Parliament based on the concern that it would be ineffective.⁵⁹ The Panel acknowledged these difficulties, concluding that:

*...the circumstances and conditions of seal hunts present certain specific challenges to the humane killing of seals. Such challenges result in a risk in any given seal hunt that the targeted animals may suffer poor animal welfare outcomes of varying intensity and duration.*⁶⁰

In the end, the EU was required to sacrifice its IC-related objectives to its seal welfare objectives. The IC exception aims to preserve traditional hunting practices despite the fact that they may result in inhumane killing of seals. More oversight may introduce a regulatory burden on IC hunts already criticized by representatives of Inuit communities for placing unrealistic requirements on populations unable to meet them.⁶¹

4. Cross-cutting themes

A. Discrimination – or bad regulation?

In 2012 Lester expressed frustration about the conflation of two distinct aims: preventing discrimination and improving regulation. Critiquing the WTO website,⁶² he asked: ‘What do they think of the different possible purposes of the trade regime? Do they not see a difference between rules based on discrimination and rules based on promoting efficient regulation or other goals?’ The rationality test also demonstrates this confusion.⁶³

In both *Brazil – Tyres* and *EC – Seal Products* problems in a regulation registered as inconsistencies, and were interpreted as proof positive of discrimination. In fact there were a number of factors at stake. In Brazil, one component of the Appellate Body’s finding of

⁵⁷ Humane Society International, Animal Welfare Triumphs as European Commission Proposes Strengthening the EU Ban on Cruel Seal Product Trade, 6 February 2015,

<http://www.hsi.org/world/europe/news/releases/2015/02/european-commission-proposal-strengthens-eu-seal-product-trade-ban-020615.html> (accessed 22 December 2016)

⁵⁸ Council adopts revised EU seal products ban to meet WTO compliance, International Fund for Animal Welfare, 1 October 2015, <http://www.ifaw.org/european-union/news/council-adopts-revised-eu-seal-products-ban-meet-wto-compliance> (accessed 22 December 2016)

⁵⁹ For an analysis of the legislative process culminating in the EU Seal Regime, see: F de Ville, ‘Explaining the Genesis of a Trade Dispute: the European Union’s Seal Trade Ban’, (2012) 34(1) *Journal of European Integration*, pp. 37-53.

⁶⁰ WTO Panel Report, *EC – Seal Products*, WT/DS400/R; WT/DS401/R, circulated 25 November 2013, para. 7.222.

⁶¹ K Hossain, ‘The EU ban on the import of seal products and the WTO regulations: neglected human rights of the Arctic indigenous peoples?’ (2012) 49(249) *Polar Record*, p. 162.

⁶² The section in question reads: ‘... the agreements are also designed to prevent governments setting regulations arbitrarily in a way that discriminates against foreign goods and services. Safety regulations must not be protectionism in disguise. They must be based on scientific evidence or on internationally recognized standards.’ It is no longer available on the WTO website but can be found at: <https://depts.washington.edu/wtohist/Research/documents/WTOmisunderstandings.pdf> (accessed 29 June 2017).

⁶³ S Lester, Book Review: ‘World Trade Law after Neoliberalism’ (2012) 15 (2) *Journal of International Economic Law*, p. 701.

inconsistency was that it imported re-treaded tyres after domestic court injunctions overruled the national ban. This resulted from a lack of coordination between Brazil's centralized legislation and regionally-administered courts. Implementing the ruling required Brazil to undertake an ambitious reform agenda that addressed its constitutional balance of power. The amount of time deemed 'reasonable' to do this within the WTO system was 12 months.⁶⁴ This created a steep challenge for Brazil. It abandoned time-consuming legislative reform and relied on the Brazilian Supreme Court. The implementation process also required institutional education as many in the Brazilian government and court system had not heard of the WTO dispute settlement system.⁶⁵ Even so, it was only possible to conform to the time limit as Brazil, in anticipation of a potential negative ruling, began to promote legislative and judicial harmonization in the early stages of the dispute.⁶⁶

This is not to say that poor governance cannot be grounds for a finding of discrimination. But is it reasonable to expect countries to be perfectly consistent in their approach to national coordination? For a big, regionally-devolved country such as Brazil, this required quite a lot of effort. It seems doubtful that such efforts are proportional to a few used tyres entering Brazil's borders from court injunctions. These efforts are certainly not helpful to the EU in responding to its market access concerns.

Contrast this with the Appellate Body's expectations of Brazil's regulatory capacities under the subparagraph of Article XX. There the Appellate Body evaluated whether a less trade restrictive measure than a ban was 'reasonably available' to Brazil. It took account of the fact that the alternative measure of recycling would require advanced technologies and expert knowledge that might not be available in all regions.⁶⁷ The pragmatic rather than idealized approach to national governance in the Article XX subparagraph reveals differing levels of rigour with which different requirements are imposed, a theme further examined in Section C below.

In *EC – Seal Products*, similar issues arise in the EU's defence of the rationality of its distinction between IC seal hunts and 'commercial' ones.⁶⁸ As in *Brazil – Retreaded Tyres*, the Appellate Body imposed an expectation of regulatory uniformity and consistency that did not reflect the realities 'on the ground'. In this case the inconsistency stemmed from the EU's poorly-thought out regulatory categories. The regulation was crafted with the input of EU Member States, and thus may well have attempted to respond to their supply chain conditions rather than Canadian or Norwegian ones. However this consultative process did not go far enough to respond adequately to the needs of its intended beneficiaries: the Inuit. According to the EU, commercial hunts were large-scale, systematic, intensive and competitive, and resulted in sales rather than subsistence.⁶⁹ The EU failed to address the complex relationship between the 'traditional' and 'commercial' elements of subsistence for Inuit communities. For example, what if a hunt is large-scale, systematic, intensive and competitive, but conducted by Inuits? Representatives of Inuit communities have made clear that the dichotomy between traditional and modern reflects romantic regulatory notions and has a pernicious effect on Inuits. It

⁶⁴ *Brazil – Tyres*, Arbitration under Article 21.3(c), above n. 34.

⁶⁵ Varella, above n. 4 at pp. 719-720.

⁶⁶ Ibid. at 717.

⁶⁷ *Brazil – Tyres*, Appellate Body Report, above n. 1, para. 175.

⁶⁸ *EC – Seal Products*, Appellate Body Report, above n. 3, para. 5.321.

⁶⁹ *EC – Seal Products*, Panel Report, above n. 58, para. 7.225.

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seconded the complainants' argument that the distinction between commercial and non-commercial hunts was 'illusory because all seal hunts have commercial dimensions'.⁷⁰ Inuit people from Canada (the complaining country) and Greenland (the 'favoured' country) have been united in their concerns that the criteria impose an artificial distinction between 'subsistence' and 'commercial.'⁷¹

The impact of the EU Seal Regime on indigenous communities which traditionally relied on seal hunts for their livelihood has provoked legal action in the European Courts from some Inuit associations as the criteria for the exception are too strict and infringe upon Inuit human rights for subsistence. Hossain describes why the prohibition of commercial elements to the seal hunt threatens Inuit subsistence:

Hunting, herding, gathering and fishing activities do not only satisfy important social, cultural and nutritional needs, but also generate a cash economy for the community as a whole. Today in the Arctic indigenous communities, there is a clear inter-dependence between formal and non-formal economies, which combine both traditional subsistence activities and a modern market presence. . . . The hunting of seals and commercializing the by-products derived from the hunts are part of the culture traditionally practiced by the Inuit and other indigenous peoples of Canada, Greenland and Norway. . . . For indigenous people it is crucial to preserve these activities as part of their subsistence rights. [footnotes omitted]⁷²

Another critique of the criteria from Inuit community representatives is that the approval process is complex and the criteria are not well-defined.⁷³ In fact, both indigenous communities and the Appellate Body cited the same problems: the artificial distinction between commercial and non-commercial, the poorly-defined criteria for 'traditional' hunts and the lack of transparency in the procedures for conformity assessment.⁷⁴ Clearly there were problems with the IC exception. The Appellate Body's recommendation to clarify the criteria governing the IC exception, and to make it more available to Canadian Inuits, may result in it being extended more fairly to better benefit Indigenous people. However the insistence (by implication) that the ban more strictly distinguish between commercial and non-commercial hunts represents the same regulatory fallacy that the EU committed.

The critique can be extended further in this case, as the Appellate Body's consistency requirement may have even contributed to the regulatory failure. The perceived need to emphasize the consistency of regulation likely explains why, for example, the EU did not claim that the Seal Regime fell under the more logical subparagraph Article XX(b) which covers measures to protect animal life or health. Instead it crafted a complex unified defence based upon a consistent 'public morals' objective. What the Panel characterized as the regime's 'prohibitive' elements (the ban) and its 'permissive' elements (the exceptions)⁷⁵ both formed part of this strategy. According to the EU, commercial hunts were morally abhorrent to EU consumers, so the EU measure prevented commercial hunting. IC hunts were distinguished from commercial hunts, thus assuaging public moral concerns about consuming seal products. Much of the Parties' argumentation focused on whether this was, or was not, consistent.

⁷⁰ Ibid. at para. 7.178.

⁷¹ L Kraemer, 'Case Note: Seal Killing, the Inuit and European Union Law,' (2012) 21(3) Review of European Community and International Environmental Law (RECIEL), p. 291.

⁷² Hossain, above n. 59, at 162.

⁷³ Ibid.

⁷⁴ EC – Seal Products, Appellate Body Report, above n. 3, at para. 5.321.

⁷⁵ EC – Seal Products, Panel Report, above n. 58 at para. 5.187.

In reality, it was not possible to impose the neat binary of commercial versus IC. More concerning is the possibility that the existence of this test influenced not only the EU's WTO defence but also the fact that it arrived at this distinction to begin with. This is not as far-reaching a hypothesis as it may seem. EU regulators are students of WTO law, and in the past the EU has taken into account the possible impacts of WTO law and revised its objectives in response.⁷⁶ This could be characterized as regulatory chill, but it's a strange kind, as it has nothing to do with achieving non-discrimination but instead exerts pressure toward simplifying regulation.

B. Implementation: recognizing the pattern

Member States can implement WTO recommendations as they wish, as long as they succeed in bringing them into conformity with WTO law.⁷⁷ Strengthening domestic regulation is a rational response to failing a rationality test, as the Appellate Body is effectively enforcing a country's *regulatory objective* against its *regulatory approach*. In practice, failure of the rationality test has led to stronger public policy regulation. As a causal connection between the test and its implementation, this seems to have gone unrecognized, though it has been celebrated (by activists) and lamented (by complainants) in individual instances, as documented above.

An artifact of non-discrimination provisions is that countries may choose to implement recommendations with more trade-restrictive regulation. This is because non-discrimination provisions evaluate treatment *relative* to other countries. The important thing is that trade partners and domestic products are treated evenly. These provisions are not concerned with the level of trade restriction *per se*.

The structure of these three disputes lends itself to this implementation outcome. In *US – Clove Cigarettes*, a 2012 dispute, the Appellate Body found that the US's ban on clove cigarettes, virtually all of which were imported from Indonesia, was discriminatory under TBT Article 2.1. This was because there was no equivalent ban on menthol cigarettes, which were 'like' products, most of which were domestically-produced. The Appellate Body concluded that this ban did not stem from a 'legitimate regulatory distinction', in large part because it was inconsistent with the US's regulatory objectives, which included reducing youth smoking, because young people enjoyed flavoured cigarettes. Menthol cigarettes were also flavoured and thus the ban was not rationally related to the regulatory objective.⁷⁸

Nonetheless, it is unlikely that the US would ban menthol cigarettes, even though this would constitute equality of (nondiscriminatory) treatment. Doing so would wipe out their domestic market. In the above disputes, in contrast, countries can implement the ruling by altering or removing the exceptions with a relatively low impact on the measure as a whole.

Thus, focusing on inconsistency seems to be a bad legal strategy for complainants in a dispute following these patterns. After *Brazil – Tyres* and *US – Tuna II*, it is difficult to see how Canada and Norway thought that attacking the EU's exceptions would result in anything other than these exceptions being removed or modified, rather than, for example, a repeal of the ban on

⁷⁶ See, eg, EB Lydgate, 'Biofuels, Sustainability and Regulatory Chill' (2012) 15 (1) *Journal of International Economic Law*, pp. 157-180; G De Búrca and J Scott, 'The Impact of the WTO on EU Decision-making', in G De Búrca and J Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001).

⁷⁷ See, eg, Appellate Body Report, *EC – Bananas* (21.5 II – Ecuador; 21.5 – US) adopted 11 December 2008 (WT/DS27/AB/RW2/ECU) and 22 December 2008 (WT/DS27/AB/RW/USA), para. 324.

⁷⁸ *US – Clove Cigarettes*, above n. 22, paras. 225-226.

seal products (though the modified exception may well make it easier for Canadian Arctic indigenous people to qualify).

All three rulings have been criticized as infringements of domestic regulatory sovereignty, which undermined the ability of the governments to pursue important public policy objectives.⁷⁹ Yet their implementation suggests the opposite of what critics have charged. Is the WTO dispute settlement system failing to do its job? Or is it doing its job well? The approach has advantages and disadvantages, and can best be viewed as the Appellate Body's response to the difficult problem of adjudicating the legitimacy of the regulation of its Member States.

C. Rationality v proportionality

Lester argues, in the context of technical barriers to trade, that the criteria employed to deciding whether trade-restrictive regulation serves the public interest are no clearer than they were 40 years ago.⁸⁰ Yet these disputes demonstrate a pattern: the Appellate Body is enforcing some criteria more strictly than others. In all these disputes, violations were found under the chapeau or even-handedness test rather than the Article XX subparagraphs and TBT Article 2.2, obligations with which the respondents were in compliance. In the latter context, the Appellate Body has evolved a test for establishing if a measure is 'necessary' to achieve the goal (under TBT Article 2.2, the 'legitimate regulatory objective' or under Article XX the relevant subparagraph eg protecting public morals). This involves 'weighing and balancing' the contribution of the measure to its goal, the reasonable availability of less trade-restrictive measures and the importance of the goal. As this test takes into account how trade restrictive a regulation is (an absolute standard) versus whether treatment among trade partners is non-discriminatory (a relative standard) it would not be possible to implement such a ruling with more trade-restrictive regulation.

Bown and Trachtman have called into question why the Appellate Body imposed an artificially high standard on Brazil in the context of the chapeau, while at the same time adopting a 'lenient' approach in the context of the subparagraph.⁸¹ In another analysis of the decision, McGrady expressed concern about the lack of detailed analysis of Brazil's policy goal under Article 2.2, and argued that the dispute settlement bodies overstepped their legitimate role in evaluating the importance of the goal at stake.⁸² It is submitted that the Appellate Body undertook a vague and permissive analysis of the 'necessity' of the measure precisely in order to

⁷⁹ See, eg, N Lavranos, 'The Brazilian Tyres Case: Trade Supersedes Health' (2009) 1(2) Trade, Law and Development, pp. 230-259. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1566133 (accessed 10 June 2014); 'WTO Rules Against Dolphin-Safe Tuna Labels, Round Three of the GATT-WTO Tuna-Dolphin Case: GATTzilla Kills Flipper Again', Global Citizen, Press Release, September 15, 2011. Available at <http://www.citizen.org/documents/press-release-wto-rules-against-dolphin-safe-tuna-labels-sept-15-2011.pdf> (accessed 10 June 2014); L Wallach, 'WTO Final Ruling: European Ban on Products from Inhumane Seal Hunts Violates WTO Rules', Eyes on Trade: Public Citizen's Blog on Globalization and Trade, May 22, 2014. Available at <http://citizen.typepad.com/eyesontrade/wto/> (accessed 10 June 2014).

⁸⁰ S Lester, 'Finding the Boundaries of International Economic Law' (2014) 17(1) Journal of International Economic Law, pp. 3-9.

⁸¹ Bown and Trachtman, above n. 25. Voon also noted a lenient 'standard of review' under Brazil – Tyres Article 2.2; T Voon, 'Evidentiary Challenges for Public Health Regulation in International Trade and Investment Law' (2015) 18(4) Journal of International Economic Law, p. 815.

⁸² B McGrady, 'Necessity Exceptions in WTO law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures' (2008) 12(1) Journal of International Economic Law, pp. 153-173.

counterbalance any perceived overstepping. In fact, common to all these disputes is this same juxtaposition of a strict standard of rationality with a lenient approach to defining the necessity of the trade restriction.

This can be seen as a strategic decision, on the assumption that rationality is appealing as a normative concept as it appears more neutral. On the other hand, weighing and balancing a regulatory objective verges on proportionality, under which the Appellate Body evaluates the importance of the regulatory objective itself against the trade contract it is bound to uphold.⁸³ This is uncomfortable territory, as the Appellate Body is empowered only to assess the presence of discrimination, and must enable countries to achieve the level of desired regulatory protection that they wish to pursue. This means that, when it comes to evaluating the validity of a regulatory objective, the Appellate Body has few tools in its toolkit; it has no way of undertaking full cost-benefit analysis, for example.

Ultimately this is a problem with no perfect solution. As Howse and Langille wrote:

*[The WTO] is not like a domestic government, which can weight all relevant, competing factors and reconsider de novo the policy choices of its members, nor is it a general world administrative agency. The WTO has a narrow remit: regulating international trade to ensure that there are not unnecessary or discriminatory barriers to trading.*⁸⁴

Yet, in evaluating the motivations for regulation, the Panel and Appellate Body must understand and to some extent emulate complex domestic regulatory processes and take command of information beyond their expertise. In so doing, they also pass judgment on how countries pursue non-trade values.

Understanding the rationality test as an attempted settlement of this problem leads to a clearer-eyed assessment of the advantages and disadvantages of emphasizing rationality at the expense of ‘necessity’. The first of these, implementation outcomes, is in the eye of the beholder. As documented above, the Appellate Body’s emphasis on *discriminatory treatment* (as opposed to violations of TBT Article 2.2 or the Article XX subparagraphs) means that a country can respond to a ruling against it by introducing more trade restrictions, as long as they are non-discriminatory.

On the positive side, this leads to non-discriminatory regulation applied fairly to all trade partners. These disputes demonstrate that WTO Member States are free to regulate for the public interest. In this sense, the emphasis on consistency can be celebrated. Furthermore, governments and activists alike are understandably uncomfortable with the idea of the WTO judging the necessity of government protections for the public welfare.

Yet the rationality test does not ultimately circumvent, but rather deepens, the problem of overly-invasive judicial review. This is because perfect rationality is a misguided goal to place on domestic regulation. It is said that ‘politics is the art of the possible’.⁸⁵ Perhaps the same can be said for regulation. There is a danger of imposing too much of a consistency requirement onto a pluralistic, democratic society as it does not match the reality of how regulation emerges. In this sense so-called ‘weighing and balancing’ is better suited for regulatory realities: it does not

⁸³ See, eg. A Desmedt, ‘Proportionality in WTO Law’ (2001) 4(3) *Journal of International Economic Law*, 441-480; also J Trachtman, ‘Trade and...Problems: Problems, Cost-Benefit Analysis, and Subsidiarity’ (1998) 9 *European Journal of International Law*, 32 – 85.

⁸⁴ *Ibid.* at p. 428.

⁸⁵ Credited to German Statesman Otto von Bismarck, Interview (11 August 1867) with Friedrich Meyer von Waldeck of the *St. Petersburgische Zeitung*; reprinted in *Fürst Bismarck: neue Tischgespräche und Interviews*, Vol. 1, p. 248.

require perfect regulatory outcomes. This is particularly relevant for environmental regulation founded in evolving and imperfect information. In *US – Tuna II*, the Appellate Body to some extent held both the US and the Panel hostage to this imperfection, though it was rooted in the complexity of the ecosystems at stake. As Bartels argued, proportionality or cost-benefit analysis is a more useful tool with which to approach questions of ‘calibration’ that the Appellate Body focused on in *US – Tuna II*.⁸⁶ Would the cost to the US of introducing observers onto all boats outside the ETP be justified in its benefits to dolphins? In this case, there were minor effects and questionable evidence of harm.

The standard of review applied to domestic regulation is crucial to defining the balance of power between an international court and the domestic government. The Appellate Body must find a compromise between *de novo* review and total deference. Oesch writes,

*...a deferential standard of review may be appropriate in certain circumstances.... This holds particularly true for domestic regulatory choices in politically sensitive matters to which panels must arguably display an appropriate degree of deference. [The Panel and Appellate Body] should leave room for domestic regulatory decision-making by establishing an ‘institutional sensitivity’ to the superior credentials which other institutions of governance potentially have in deciding substantive trade-offs between various policy preferences.*⁸⁷

Similarly, Voon argues that reviews of scientific evidence (such as those undertaken in *US – Tuna II*) should adopt due deference to national authorities rather than assuming the position that scientific expertise is not necessary to apply the law to the facts.⁸⁸ The problem with the emphasis on rationality is that it clouds the reality of trade-offs and the need for deference to national risk-assessment processes; in all the disputes reviewed here, the compromises and imperfections of the regulation that the Appellate Body focused on did not appear from this analysis to constitute discrimination.

9. Conclusion

The rationality test has become a key component of how the Appellate Body adjudicates the compliance of public policy regulation with WTO law. Through this approach, the Appellate Body has adopted the normative concept of rationality as a basis for legitimacy. This can be understood as a strategic decision that rationality appears to be value-neutral, and thus preferable to approaches for evaluating the legitimacy of public policy that verge closer to proportionality. The rationality test is procedural rather than substantive in its emphasis. It seems to lend itself to judicial testing without the need to resort to complex relativism. Yet the idea that regulation should be ‘rational’ is itself problematic, as rationality is an idealized concept. The association of rationality, consistency and non-discrimination is not always persuasive. Perversely, it underlines that the Appellate Body is an institution which imposes certain values; in this case, rigid ideological consistency. In these disputes, the high standard of consistency meant that the Appellate Body did not defer to either RTA obligations or national environmental risk

⁸⁶ Video recording, Talking Disputes, The *US – Tuna II* Compliance Dispute, ICTSD, 7 May 2015, available at: <https://www.youtube.com/watch?v=PjIEl4poXaU> (accessed 22 December 2015).

⁸⁷ M Oesch, *Standards of Review in WTO Dispute Settlement*, International Economic Law Series (OUP: Oxford, 2004) p. 31.

⁸⁸ Voon, above n. 22, p. 826.

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assessments. The approach also displays an antipathy for regulation with multiple objectives, particularly if there are any potential conflicts between them.

As one of the most mature and sophisticated adjudicators of public international law, the Appellate Body's experience is instructive. The rationality test is an attempted settlement of a political problem that will probably only become more severe in the era of Trump and Brexit: how does a trade tribunal evaluate the legality and appropriateness of national regulation? To avoid some of the disadvantages of the rationality test, the Appellate Body should not shy away from evaluating the 'necessity' of regulation, but should on the whole be more deferent to messy national compromises.